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THE CONSTITUTIONALITY OF LAW REQUIRING RAILROADS TO DELIVER THEIR CARS TO CONNECTING CARRIERS.

For some time the United States Supreme Court has had under consideration the construction of that important provision of the Kentucky Constitution which provides, in effect, that all railroads "shall receive, deliver and switch empty or loaded cars and shall transport, receive, load or unload all the freight in car-loads or less quantities coming or going from any railroad."

In the case of Central Stock Yards v. L. & N. Railway Co., 192 U. S. 568, it was held that this provision of the Kentucky constitution did not impose an obligation upon a railroad having its own stock yards in Louisville to accept live stock from other states for delivery at the stock yards of another railroad in the same city and neighborhood although there is a physical connection between the two roads.

The distinction the court seeks to make in this case is that while a carrier may be required to continue a shipment beyond its own line where its track joins another road, yet it cannot be required to transfer such shipment to another carrier at the point of delivery. In the case cited the freight was forwarded over the defendant's line to Louisville but billed for delivery at the depot of the Southern Railway in the same city. "The requirement," the court said, "to deliver, transfer and transport freight to any point where there is a physical connection between the tracks of the railroad companies, must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line. It cannot be intended to sanction the snatching of the freight from the transporting company at the moment and for the purpose of delivery."

The construction thus put upon the terms of the provision of the Kentucky constitution already recited did not meet the approval of the Kentucky Court of Appeals which subsequently held that as to interstate shipments the constitution did apply to changes of shipment from one carrier to another carrier at point of delivery. This decision brought the case up before the Supreme Court of the United States again and in the recent case of L. & N. Ry. Co. v. Central Stock Yards Co., 29 Sup. Ct. 246, this provision of the Kentucky constitution as thus construed is held unconstitutional the holding being to the effect that the property of a railroad is taken without due process of law when they are required to accept all cars offered to it at an arbitrary connecting point near its terminus, by a competing road, for the purposes of reaching and using the former's terminal facilities.

The decision of the court goes further and lays down the rule on another very important question of law holding that to require a railway company to deliver its own cars to another railway company deprives the former company of its property without due process of law, because such provision contains no adequate protection for the carrier from loss or undue detention of its cars, and for securing due compensation for their use. The modification which the court thus adds to the broad statement that a common carrier cannot be compelled to deliver its cars to a connecting carrier is important. "In view of the well-known and necessary practice of connecting roads," says the court, "we are

far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transhipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal, undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

Is the Supreme Court right on this question? Is it necessary before a constitutional provision becomes self-acting that it must prescribe in detail rules to meet every possible question arising thereunder? We are inclined to unite our voice with that of the three dissenting judges, Justices McKenna, Harlan and Moody, in demanding an answer to the question put by Justice McKenna, to-wit: "May not the principle or rules of regulation be prescribed by laws, statutory or constitutional, and the conditions of its application be ascertained and enforced by the courts or an administrative body?" What right has the court to pass on an abstract question of construction when the concrete case before it presents no such question? In the case before the court there was no taking of defendant's property without due process of law, for the reason that the state court had fully safe-guarded the defendant's interests and by its construction of the constitutional provision virtually supplied all the regulations necessary to protect the interest of any other carrier forced to meet the requirements of this constitutional provision.

NOTES OF IMPORTANT DECISIONS.

ATTORNEY AND CLIENT—DISBARRED ATTORNEY DISQUALIFIED FROM ACTING AS STATE'S ATTORNEY.—"The way of the transgressor is hard." Even so, is it true with the lawyer who tramples under foot the ethics of his profession. In an interesting opinion handed down by the Supreme Court of South Dakota in Danforth v. Egan, 119 N. W. 1021, the right of a disbarred attorney to take office as state's attorney is considered. Defendant Egan received a majority of the votes cast for state's attorney in his county, and was given a certificate of election. He had formerly been a licensed attorney in the state, but was disbarred from practicing therein shortly before his election. It was practically admitted that the judgment of disbarment would prevent his appearance in the courts of record in the state, but it was claimed that this duty might be performed by a deputy. The court held, however, that defendant could not be allowed to dictate and oversee this important part of the work of his office while prohibited from performing it in person. It was also alleged that under the Constitution the only qualification imposed was that the state's attorney should be "learned in the law," and consequently need not be an attorney at all. But the court said that the use of the word "attorney" in the title of the office, "state's attorney," definitely indicated that the office should only be filled by one regularly admitted to practice in the courts.

All of the grounds mentioned would seem sufficient to have conclusively determined the case adversely to the defendant. But the court goes further to discuss another qualification for one holding the office of prosecuting attorney. The statute provides that he must be "learned in the law." What does the use of this high-sounding phrase, so often employed by attorneys, convey to the minds of even professional men? The court, in the principal case, furnishes an interesting argument on the meaning of this qualification.

The court said: "It is the contention of appellant that, being 'learned in the law,' he meets the requirement of the constitution, and is entitled to hold the office in question. We have already shown that this phrase 'learned in the law' is really mere surplusage as it is controlled by the more limited term 'attorney,' yet we will consider briefly this phrase, and see whether the appellant could bring himself thereunder in view of the judgment of this court in the disbarment proceed-

ings. To be learned in the law one certainly must be learned in all those branches of the law which have at all times been recognized as essential in order to qualify one to practice as an attorney, and to be admitted as such. He must not only be versed in the books of law, such as those on contracts, torts, evidence, domestic relation, etc., but it is even more important that he be well based upon those rules of conduct which as a lawyer and practitioner should control his relations with his fellow lawyers, his clients, witnesses, and jurors in court, and the public in general. Knowledge of this branch of the law, commonly known as 'legal ethics,' has long been recognized as the most important qualification for one who is to be intrusted with the sacred duties of an attorney at law, and our present statute recognizes this fact, and makes legal ethics one of the branches to be considered in passing upon the qualification of one seeking admission to practice. Section 686, Pol. Code. This court has by its judgment held that the appellant has violated many of the ethical laws which should control the conduct of an attorney. We took no part in said judgment, but we are bound to take judicial notice of it, especially as it is referred to in the record in this case. We must as a matter of law, and we do presume that the decision of the court in the disbarment proceedings was just, and that everything stated therein was justified by the evidence. It appears, therefore, that prior to such decision this appellant had done many things which showed either gross ignorance of, or willful disregard of, the laws of legal ethics. When this fact has been judicially determined, as in this case, against this appellant, he will not be heard to claim that he knew his duties and the ethical rules which should have controlled his actions, and intentionally disregarded the same, but the law in its kindness will conclusively presume that he performed those acts which caused his disbarment in ignorance of his duties and of the rules of ethics, and will therefore say that no matter how well versed he may be in many branches of the law, yet being ignorant in its most important branch, he is not 'learned in the law.'"

With this judicial declaration in favor of "legal ethics" as "the most important" branch of the law, why is it that so many law schools fail to give it any sufficient attention and thus send out students who, no matter how much informed on subjects of substantive law cannot be said to be "learned in the law" unless they are fully acquainted with these rules. In section 168 of Robbins on American Advocacy, the author in discussing the "Inviolability of the Code of Ethics" says: "The public very wisely rates a lawyer by what his professional brethren think of him, and an advocate who, by his unprofessional tactics and conduct, assiduously invites and cultivates the enmity of the members of his own bar, will very quickly hit the bottom, and stay there among the 'snitches' and vagabonds of the profession until he comes to himself, and by circumspecting his conduct and courting the confidence and respect of other lawyers, he finally wins the place to which his ability entitles him." And in section 169 the author states: "The statutes in most states provide that a license to practice law authorizes the advocate 'to appear in all the courts within the state and there to practice as an attorney and counselor at law, according to the laws and customs thereof, for and during his good behavior in said practice.' By the term 'laws and customs' of practice is meant the principles of the code of ethics as well as the rules of court provided for the purpose of regulating the local practice of the law."

CRIMINAL TRIAL—SHALL THE COURT BE PERMITTED TO SMILE?—Modern judges very frequently neglect to maintain that stern decorum so characteristic of the early jurists in this country and in England. "As solemn as a judge" has grown into a maxim with the laity, who cannot adjust themselves to any other demeanor on the part of the judge on the bench. Even the bar is become saturated with this false notion of judicial gravity until even a smile, lighting up the features of the court is cause for immediate objections.

To show that our observations in the preceding paragraph are not at all exaggerated we call attention to the recent case of Bellamy v. State (Fla.), 47 So. Rep. 868. In this case during the course of the trial the defendant requested the court to have one Ananias Godwin sworn and put under the rule, whereupon the court smiled, and the defendant's counsel noted an exception to the smile and expression of the court. He was asked if he desired to note an exception to the expression of the court's face, and answered: "Yes; to the smile and expression." Ananias was not tendered as a witness, nor did it appear what testimony it was expected to secure from him.

To the everlasting relief of an over-bored judiciary and the supreme court of Florida has proclaimed its independence and that of every trial judge from that absurd idea that a bilious aspect is more becoming to one who wears the ermine and that not the slightest quiver of a facial muscle disturb his foreboding demeanor. The court said in regard to the facts in the particuar case: "It is impossible to place us in a position to intelligently consider the harmful effect, if any, this slight lapse from severe judicial decorum might possibly have produced, should the witness have been thereafter before the jury. It is reasonably certain that, had the witness been presented to the jury, the biblical forbear of the name would speedily have been brought to the attention of any juror so ignorant as to be unaware of it, and that the smile was most natural, if not justifiable or excusable."

THE RIGHT OF A TENANT TO REMOVE FIXTURES AFTER TAKING A NEW LEASE.

There has been much controversy as to the right of a tenant to remove trade fixtures after the expiration of the term under which they were installed. It has always been held that the right of removal of trade fixtures is, in a sense, a privilege which may be lost or waived.[1] Where the term was certain the earlier English authorities limited the right of removal to the actual term of the demise.[2] This rule was early relaxed and it was held that the tenant might remove fixtures of this nature, either during his term, or thereafter while he is still in occupation, in contemplation of law under the original lease, "during what may, for this purpose, be considered as as excrescence on the term."[3]

The question here presented is as to the rights of a tenant who continues in possession under a new lease, reserving no right to the lessee in fixtures annexed during the previous term. In Fitzherbert v. Shaw,[4] decided in 1789, a purchaser of land brought ejectment against a tenant. The parties agreed that judgment should be signed for the plaintiff with a stay of execution. It was held that "the fair interpretation of the agreement was that as the defendant was to remain in possession for a certain time after that agreement was entered into, and judgment signed in the ejectment, he should do no act in the meantime to alter the premises, but should deliver them up in the same situation they were in when the agreement was made and the judgment signed."

This case was followed in Heap v. Barton,[5] where there was a similar agreement and it was held that "the fair effect of the agreement . . . precluded the defendant's right to remove the fixtures in question," Williams, J., remarking, that the tenants "remained in as trespassers subject to the plaintiff's undertaking not to issue a writ of restitution until a given day." In Thresher v. East London, etc., Co.,[6] it was decided that a lessee, who had erected trade fixtures, consisting of buildings, and who afterwards took a new lease of the premises which expressly mentioned "buildings" thereon, and which contained a covenant to repair the premises and "buildings," should be bound to repair the buildings so erected by him, unless strong circumstances existed to show that they were not intended to pass under the general words of the demise. In Sharp v. Milligan,[7] tenants in possession agreed to take a new lease of a mill, with the engine, gas houses and appurtenances, as the same were then occupied by them, and the main shafts and going gear for working the machinery therein. It was held that they were not entitled to a lease excluding the portion of the gas works and machinery erected by them.

It has not been considered in England that these cases determined the question here involved. In Ex parte D'Eresby,[8] the Supreme Court of Judicature said that "when the simple case shall arise of a tenant having removable fixtures, continuing his possession under a new or extended term, we desire to hold ourselves perfectly free as to the question whether he retains his right of removal during such continuous possession." But the above cases have in some measure at least been made the basis of a rule adopted by many courts in the United States that fixtures not reserved in a new lease are lost to the tenant.

The earliest leading American case on the subject is Loughran v. Ross,[9] decided

(1) London, etc., Co. v. Drake, 95 E. C. L. 798; Ex parte Stephens, 7 Ch. Div. 127; Ex parte Brook, 10 Ch. Div. 100; Talbot v. Whipple, 14 Allen, 177; Shepard v. Spalding, 4 Met. 416.

(2) Tyler on Fixtures, 427; Jones Landlord & Tenant, 721; Poole's Case, 1 Salk, 368; Lee v. Risdon, 1 Taunt, 191; Minshall v. Lloyd, 2 M. & W. 450.

(3) Mackintosh v. Trotter, 3 M. & W. 184; Watriss v. Bank, 124 Mass. 571; Penton v. Robart, 2 East, 88.

(4) 1 H. Bl. 258.

(5) 12 C. B. 274 (1852).

(6) 2 B. & C. 608 (1824).

(7) 23 Beav. 419 (1857).

(8) 44 L. T. N. S. 781 (1881).

(9) 45 N. Y. 792, 6 Am. Rep. 173.

in 1871. It was there held that if a tenant, having the right to remove a building erected by him on the demised premises, accepts a new lease of such premises, without reservation or mention of fixtures, his right of removal is gone. The court cites as authority the early English cases above mentioned. This case in effect overrules the earlier case of Devin v. Dougherty.[10]

The rule of Loughran v. Ross has been followed in a number of other states and for a long time at least, was the prevailing rule in this country.[11] The reason of the rule is stated as follows: "It results from the terms of the lease that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture erected by him under a previous lease and that he has a right against the face of this contract to sever and remove it. To permit the tenant to do this would, in effect, be to permit him to deny the title of his landlord to part of the demised premises, and if he may deny his title to a part, why not to the whole? The acceptance of the new lease was an effectual surrender of the old, together with all the estate and all other rights which the old lease secured to him. Thenceforth he was in as of a new estate."[12]

In some of the cases cited mention was made of the fact that the second lease contained the very common covenant to deliver up the premises at the end of the term in the same condition, but in none was that a controlling consideration.[13] That fact should not have any controlling significance since the obligation of the tenant in the absence of any covenant is to restore the premises leased without waste.[14]

No distinction is apparent in the early cases between the different kinds of trade fixtures. The same rule was applied to buildings and to other removable fixtures so long as they were trade fixtures. Nor was the fact that the right of removal of certain fixtures was provided by the terms of the lease or other agreement considered material. So long as the right of removal existed, it was apparently not considered material whether that right was given by agreement or by operation of law.[15]

Of late years there has been a breaking away from the doctrine of Loughran v. Ross. It was repudiated in Michigan in Kerr v. Kingsbury,[16] decided in 1878. In that case Cooley, J., said: "The right of a tenant to remove the erections made by him in furtherance of the purpose for which

(10) 27 How. Pr. 455 (1864).

(11) Taylor Landlord & Tenant, 552; Ewell on Fixtures, 174-5; Tyler on Fixtures, 437-9; Merritt v. Judd, 14 Cal. 60 (engine and pump); Jungerman v. Vovee, 19 Cal. 355 (brick building); Marks v. Ryan, 63 Cal. 107 (dwelling and barn); Wadman v. Burke, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.), 1192 (bar fixtures); Sanitary Dist. v. Cook, 169 Ill. 184, 48 N. E. 461, 39 L. R. A. 369, 61 Am. St. Rep. 161 (buildings, trade fixtures); Ganggel v. Ainley, 83 Ill. App. 582 (bakers' oven and wooden building); Smith v. Stoddard, 105 Ill. App. 510 (corn crib); S. C. 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314; Hedderick v. Smith, 103 Ind. 203, 2 N. E. 315 (club house); Unz v. Price, 22 Ky. L. Rep. 791, 58 S. W. 705; Carlin v. Ritter, 68 Md. 478, 13 Atl. 370, 16 id. 301, 6 Am. St. Rep. 467 (buildings); Watriss v. Bank, 124 Mass. 571, 26 Am. Rep. 694 (bank vault); McIver v. Estabrook, 134 Mass. 550 (building); Williams v. Lane, 62 Mo. App. 66 (shelving); Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491 (buildings and fences); Champ v. Roth, 103 Mo. App. 103, 77 S. W. 344 (shafting, platforms and pulleys); St. Louis v. Nelson, 108 Mo. App. 210, 83 S. W. 271 (buildings); Cook v. Scheid, 6 Ohio Dec. Reprint, 867 (engine and boiler); Spencer v. Comm. Co., 30 Wash. 520, 71 Pac. 53 (hydraulic press, floors and partition); Wright v McDonald (Tex. Civ. App.), 27 S. W. 1024 (house, railroad track and coal chutes); Questioned on appeal, 88 Tex. 140, 30 S. W. 907, See Hertzberg v. Witte, 22 Tex. Civ. 320, 54 S. W. 921. See also Pronguey v. Gurney, 36 U. C., Q. B. 53, 37 id. 347 (bakery and fittings); Orr v. Davis, 17 New Zealand, L. R. 106 (shop fittings); Harper v. Gaynor, 19 Vict. L. R. 675 (stables).

(12) Jones Landlord & Tenant, 718, quoting, Hedderick v. Smith, 103 Ind. 203, 2 N. E. 315.

(13) Thresher v. Waterworks Co., 2 B. & C. 607; Watriss v. Bank, 124 Mo. 571; Loughran v. Ross, 45 N. Y. 792; Stephen v. Ely, 162 N. Y. 79; Nieland v. Mahinken, 85 N. Y. S. 809; Marks v. Ryan, 63 Cal. 107; San. Dist. v. Cook, 169 Ill. 184; Wadman v. Burke, 147 Cal. 351.

(14) 1 Taylor, Landl. & Ten. Sec. 343, 18 Encyc. of Law, 403; Henderson v. Squire, L. R. 4 Q. B. 170; Wilson v. Prescott, 62 Me. 115; Carlin v. Ritter, 68 Md. 478, 13 Atl. 370; U. S. v. Bostwick, 94 U. S. 65.

(15) Marks v. Ryan, 63 Cal. 107; St. Louis v. Nelson, 108 Mo. App. 210, supra.; Unz v. Price, 22 Ky. L. 791, 58 S. W. 705; Talbot v. Cruger, 151 N. Y. 117, 45 N. E. 364; Stephens v. Ely, 162 N. Y. 79, 56 N. E. 499; Kern v. Kingsbury, 39 Mich. 150, hereinafter cited.

(16) 39 Mich. 150.

the premises were leased, is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might or ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term. . . . But why the right should be lost, when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal, what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

The rule has likewise been repudiated or discredited elsewhere. In Bank v. Merrill,[17] the Wisconsin Supreme Court said: "He (the tenant) is not supposed to treat for a lease of what he already owns, but for a lease of what the landlord owns; and if he accepts a lease which does not in clear terms, cover the property which he himself owns, it ought not, as against him, and for the purpose of working a release of his right to the landlord, to be construed to cover such property." It has been held not to apply where the lease provides for the right of removal of such fixtures at its termination,[18] although, as above indicated, such an agreement did not in fact in any sense vary the common law rights of the parties. It has been held not to apply to the case of a new lease which is a renewal of the old one on the same terms.[19] This latter limitation has, in fact, been recognized in some of the states where the rule obtains.[20]

In states where the rule obtains, its application has been, in other particulars, much circumscribed. In Washington, where the rule obtains, it has been held not to apply where a tenancy from month to month was converted into a tenancy for 18 months at the same rental but in consideration of certain repairs by the lessee.[21] In Illinois, where the rule obtains, it was held not to apply where a partnership lease was surrendered and a lease accepted by one of the partners covering the balance of the term upon the same conditions as the original lease,[22] and this notwithstanding the rule that such a transaction operated as a surrender of the old lease.[23] It may also be observed that in Maryland where the rule formerly obtained, it was abolished by statute in 1898.[24]

But the most significant development of recent decisions is the virtual repudiation

(17) 69 Wis. 501, 34 N. W. 514, see also Wright v. McDonald, 88 Tex. 140, 30 S. W. 907; Wittenmeyer v. Board, 10 Ohio C. C. 119.

(18) McCarthy v Truemacher, 108 Ia. 284, 78 N. W. 104; Daly v. Simonson, 126 Ia. 716, 102 N. W. 780; and see O'Brien v. Mueller, 96 Md. 134, 53 Atl. 663.

(19) Radey v. McCurdy, 209 Pa. St. 306, 58 Atl. 558; Young v. Consolidated Imp. Co., 23 Utah, 586, 65 Pac. 720; Ross v. Campbell, 9 Colo. App. 938, 47 Pac. 465; Royce v. Latshaw, 15 Colo. App. 420, 62 Pac. 627; Crandall v. Ulyatt, 40 Colo. 35, 90 Pac. 59.

(20) McDonough v. Starbird, 105 Cal. 15, 38 Pac. 510; Hedderick v. Smith, 103 Ind. 203, 2 N. E. 315; Watriss v. Bank, 124 Mass. 571; Clark v. Howland, 85 N. Y. 204.

(21) Lynn v. Waldron, 38 Wash. 82, 80 Pac. 292.

(22) Baker v. McClurg, 198 Ill. 128, 64 N. E. 701.

(23) Wood Landlord & Tenant, Sec. 489; Taylor Landlord & Tenant, Sec. 512; Jones Landlord & Tenant, Sec. 542; citing among others, Hoag v. Carpenter, 18 Ill. App. 555, see also Jongerman v. Bovee, 19 Cal. 354 (herein cited).

(24) Laws 1898, ch. 92.

of the doctrine in New York. The rule was followed in that state in a number of cases and applied both to buildings and other fixtures.[25] But in other cases it was either limited or criticised.

In Howe's Cave Ass'n. v. Houck,[26] it was held that the taking of a new lease was not conclusive but simply raised a presumption that might be rebutted by showing a contrary intention. In Livingston v. Sulzer,[27] it was held that words in the new lease excepting such portion of the property as was owned by the tenant was a sufficient manifestation of intent to take the case out of the rule. In Moore v. Wood,[28] it was said: "The rigor of the ancient law of fixtures has yielded and must continue to yield to the contingencies of modern times. The law must take notice of trade and manufacturer and their wants and afford them adequate and appropriate protection." In Smusch v. Kohn,[29] it was held that the rule should not be applied to ordinary removable fixtures. In Lewis v. Ocean, etc., Co.,[30] in the court of appeals, Loughran v. Ross, was discredited. Peckham, J., said: "The decision in that case was placed upon quite technical reasoning, supported, it is true, by some authorities, but it is not one of those cases whose principle should be extended."

Finally in Bernheimer v. Adams,[31] the question was squarely presented and Loughran v. Ross, so far as it applied to trade fixtures, was virtually overruled. The court held that "no rule of law or public policy required that tenants . . . should lose their rights (to trade fixtures) by a failure to specify in the lease that the right of removal was reserved, and such a doctrine would be most inequitable." This case draws a distinction between trade fixtures and removable buildings erected by a tenant which are in their nature "distinctively realty." As to this it is said, "The Loughran case involved the right to remove a building which was distinctively real property . . . We think the Loughran case should . . . be deemed not applicable to trade fixtures not distinctly realty, designed to retain their character as personal property and capable of removal without material injury to the freehold." It is to be observed, however, in this connection, that in Loughran v. Ross, the building in question was admittedly a removable fixture and the decision was not predicated on the fact that it was a building or not strictly a trade fixture. It is a well recognized fact that buildings may be trade fixtures,[32] and it is probably not the intention of the court in Bernheimer v. Adams, to discriminate between different kinds of trade fixtures nor to hold that buildings may not be trade fixtures, but to make the fact of erection for purposes of trade or otherwise the basis of the distinction. In the later case of Precht v. Howard,[33] a building was held not removable after successive leases and the decision was predicated on the fact that "the structure had not been erected for purposes of trade."

In a still more recent case than Bernheimer v. Adams, (1905), the United States Circuit Court of Appeals, (sitting in New York), distinctly repudiated the doctrine of Loughran v. Ross, as applied to trade fixtures,[34] and expressly approved the early case of Devin v. Dougherty, supra.[35] Cox, J., said: "The trend of recent authority is toward a restricted application of the rule to trade fixtures so as to prevent manifest

(25) Abell v. Williams, 3 Daly, 17 (buildings); Hayes v. Schultz, 33 Misc. 137, 68 N. Y. S. 340 (building); Nieland v. Mahnken, 89 App. Div. 463, 85 N. Y. S. 809 (watering trough and other fixtures); Talbot v. Cruger, 151 N. Y. 117, 45 N. E. 364 (buildings); Stephens v. Ely, 162 N. Y. 79, 56 N. E. 499 (plumbing). See also Van Vleck v. White, 66 App. Div. 14, 72 N. Y. S. 1026; Scott v. Haverstraw, 135 N. Y. 141, 31 N. E. 1102.

(26) 66 Hun, 205, 21 N. Y. S. 40, affirmed 141 N. Y. 606, 36 N. E., 740.

(27) 19 Hun. 375.

(28) 12 Abb. Pr. 393.

(29) 22 Misc. 344, 49 N. Y. S. 176.

(30) 125 N. Y. 341, 26 N. E. 301.

(31) 75 N. Y. S. 93, aff. 175 N. Y. 472, 67 N. E. 1080 (1903).

(32) Ewell on Fixtures, 96; Brown v. Reno &c Co., 55 Fed. 229, 231; Security &c Co, v. Willamette &c. Co., 99 Cal. 636, 34 Pac. 321; Wiggins v. Ohio &c R. Co., 142 U. S. 396; Van Ness v. Paccard, 2 Pet. 137.

(33) 187 N. Y. 136, 79 N. E. 847, 9 L. R. A. (N. S.), 483 (1907).

(34) Bergh v. Herring, 136 Fed. 368, 70 L. R. A. 756.

(35) 27 How. Pr. 455, see note 10.

injustice. Regarding the rationale of the rule it is difficult to discover any principle of logic or equity which can be invoked in its support. . . . If the defendant's contention be correct, the moment the tenant goes into possession under the new lease, the title to this exceedingly valuable property passes to the landlord. Such a rule must yield to modern conditions and modern progress." The opinion calls attention to the distinction made in Bernheimer v. Adams, supra, and in that connection it is said: "The court makes a distinction, which we think is a proper one, between fixtures which are distinctively realty, such as buildings, fences, bank-vaults and the like, and chattels known as trade fixtures which are capable of being removed without injury to the freehold. With this distinction observed, no injustice can be done. If the fixtures are appurtenant to the land so that a deed or lease of the premises will necessarily include them, but, as to chattels, which can be removed and carried away without injury, no such exception should be necessary." The property involved in this case was the machinery and appliances of a factory. The question as to what rule should be applied to buildings was therefore not directly involved.

While the discussion in the cases has taken a wide range, there is, in fact, only one essential point of controversy and that is as to what the new lease includes. If the new lease, in fact, includes the property which, up to that time was a removable fixture, then no doubt the right of removal is gone. Whatever is included in the lease must be restored at the end of the term and the tenant is estopped from claiming it as his own. There is no controversy as to that. But on the one hand it is said that "the fixtures set upon the premises at the time of the lease are part of the thing demised,"[36] and that "a lease of lands and premises carries with it the buildings and fixtures on the premises,"[37] while on the other hand it is said that "unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the (removable) buildings as part of the realty . . . . it ought not to be held to include them unless, from the lease itself, an understanding to that effect is plainly inferable,"[38] and it was pertinently said in another case that "when the written lease was executed it covered only the realty. It no more included these chattels than any other personal property belonging to the tenant, and upon the demised premises at the time. By taking the new lease the tenant's right to any personal property belonging to him were neither lost nor in any wise affected."[39]

There is no controversy as to the proposition that a sufficient manifestation of intent in the new lease will save the trade fixtures to the tenant. In the early case of Van Rensselaer v. Penniman,[40] it was said: "If the acts of the parties . . . taken all together, are such as to rebut the idea of a surrender, then none ought to be presumed," and in Flagg v. Dow,[41] it was said that "although the taking of a new lease is generally to be regarded as the surrender of an existing lease, it is not always so," and that a different construction may be given in order to secure to the lessee compensation for improvements.

In the last analysis, therefore, the difference between the two lines of cases is that the cases sustaining the doctrine of Loughran v. Ross hold that a new lease presumptively includes trade fixtures,[42] whereas the other line of cases hold presumptively that it does not.[43] The whole question as to what the new lease includes should logically depend on whether the fixtures, at the time the second lease is executed, are to be con-

(36) San. Dist. v. Cook, 169 Ill. 184 supra., citing Wood Landlord & Tenant, par. 532; see Carlin v. Ritter, 68 Md. 478, supra.

(37) Loughran v. Ross, 45 N. Y. 792, supra.

(38) Kerr v. Kingsbury, 39 Mich. 150, supra.

(39) McCarthy v. Truemacher, 108 Ia. 284, supra.

(40) 6 Wend. 568.,

(41) 99 Mass. 18, see also Jones Landlord & Tenant, 720; Howe Cave Ass'n v. Houck, 66 Hun. 205, 21 N. Y. S. 40, Aff. 141 N. Y. 606, 36 N. E. 740; Livingston v. Sulzer, 19 Hun. 375.

(42) Wadman v. Burke, 147 Cal. 351, supra;

(43) Kerr v. Kingsbury, 39 Mich. 150, supra.

sidered as realty or as personal property,[44] although it has been said that trade fixtures, though removable, are at all times real estate and not chattels so long as they are attached.[45] It is manifest that trade fixtures do, in fact, sustain a dual character and it is this peculiar nature of trade fixtures that is responsible for the whole controversy.

OSCAR HALLAM.

St. Paul, Minn.

(44) Jones Landlord & Tenant, 720; Watriss v. Bank, 124 Mass. 571, supra.

(45) 13 Am. and Eng. Encyc. of Law, 641 and cases cited.

BANKS AND BANKING—CHECK TO FICTITIOUS PAYEE.

JORDAN MARSH CO. v. NATIONAL SHAWMUT BANK.

Supreme Judicial Court of Massachusetts. Suffolk. March 6, 1909.

The duty of a bank on which a check is drawn to see that there is a genuine indorsement is the same in law, whether the check is made payable to a fictitious or non-existing person, through the drawer's negligent failure to discover the fraud by which the check is obtained, or is made payable to an actual existing payee.

KNOWLTON, C. J.: These are seven suits, brought against seven corporations doing a banking business in the city of Boston. In each of these banks or banking companies the plaintiff was a depositor. The suits are all of the same character, and the opinion in the first of them will be equally applicable to all the others. The declaration contains two counts, one for money had and received, to recover the balance of the plaintiff's deposit after a demand, and the other setting forth the contract between the plaintiff and the defendant, and that the plaintiff made sundry checks, payable in part to the order of fictitious or nonexisting persons, which fact as to these persons was not known to the plaintiff, and in part to the order of one A. L. Sefton, and that the defendant paid these checks upon forged indorsements of the names of the payees. The cases were submitted to the superior court upon the report of an auditor who found for the defendants. The judge found pro forma for the defendants, and reported the cases to this court.

It appears by the auditor's report that the plaintiff was conducting a very large business in selling goods in a department store. In the store there were about 80 separate departments, each in charge of an employee known as a buyer. There was in the store an elaborate system for buying, receiving, checking off, registering and inventorying all goods brought to the store for sale, and for dealing with the bills for these goods and authorizing payment for them, and for making and transmitting checks to vendors. There were certain variations from the usual method of dealing with bills and checks when a buyer was in a hurry to get the goods upon the shelves for sale, or when a large discount could be obtained from a bill by immediate payment of it, or when a bill was presented by a seller in person who was eager to be paid at once. One of the plaintiff's employees, who was hired as a checker of the goods received, devised a scheme of fraud, whereby, with the assistance of a confederate, he was able to obtain the plaintiff's checks in payment of fictitious bills for goods supposed to have been bought by heads of departments and received at the store. Many of these checks were drawn on the defendant bank, and were paid by the defendant through the clearing house. The defendant did not verify or attempt to verify the signatures of the payees on the checks, but the checks were examined to see that the signature of the plaintiff was genuine, that there was nothing irregular or suspicious on their face, that they were indorsed with the payee's name, and that they bore the indorsement of the bank sending them through the clearing house. On the checks, or on most of them, were stamped the words: "Indorsement guaranteed. Pay only through the Boston Clearing House. The Commercial National Bank of Boston, B. B. Perkins, Cashier." The payments were made by the defendant from moneys belonging to the plaintiff. The auditor found "that there was no actual negligence on the part of either of the defendant banks or trust companies in paying the checks."

The auditor has found that the plaintiff, in the method of doing its business and in the conduct of its officers and employees, was negligent in not discovering and preventing the fraud by which it was induced to draw checks payable to fictitious persons, and to another person who was not entitled to payments. The auditor has also found that this negligence induced the defendant to pay these checks. The facts are pretty fully stated in the report, and the question arises whether there was any evidence of negligence which

was a direct and proximate cause of the payment of these checks upon forged indorsements, or whether the negligence only produced conditions which were followed by criminal acts of forgery by a third person, which acts were not discovered by the defendant through its failure to make investigation as to the pretended indorsements by the payees. Assuming that, under some circumstances, negligence of a depositor inducing an unauthorized payment of a check by a banker may be availed of in defense of a claim by the depositor for the money paid, it seems plain that only negligence which is a direct and proximate cause of the payment can be effectual in making such a defense. Some of these checks were made payable to A. L. Sefton, a woman, and were indorsed by her. We think it plain that these were not payable to a fictitious person, and that the payments were rightly made. Other checks were in the same form and were not indorsed by her. Assuming for the moment that these were not payable to a fictitious person, they were paid on forged indorsements. If one is fraudulently induced to deliver to a person who is not entitled to it a check made payable to another person who is not entitled to payment of it, can this negligence in suffering the fraud to be practiced upon him be found to be a direct and proximate cause of a payment made by the banker on whom the check is drawn, upon a forged indorsement of the name of the payee, without any investigation by the banker as to the genuineness of the indorsement? We think not. The check is like any other check payable to a real person which happens to be in the possession of another person. It is possible to forge an indorsement upon it, as it is to forge an indorsement upon any other check. Perhaps the circumstances make a speedy detection of such a forgery less probable than in ordinary cases. But the whole duty of seeing whether there is a forgery of such an indorsement upon any check rests primarily upon the banker. The drawer of the check has nothing to do with that. Ordinarily he makes no representation that has any relation to it. In the case just supposed he made no representation in regard to it. The checks payable to the order of A. L. Sefton, which she did not indorse, were wrongly paid, and the defendant's liability for payment is like that for the payment of any other check bearing such a forged indorsement. The plaintiff had nothing to do with the payment, or with the defendant's performance or nonperformance of its duty to see that payment was made to the right person.

There are many cases that illustrate the rule that negligence of the maker is immaterial unless it is of a kind that directly and proximately affects the conduct of the banker in the performance of his duties. Belknap v. National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105; Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516, 51 N. E. 9, 41 L. R. A. 617, 68 Am. St. Rep. 446; Arnold v. Cheque Bank, L. R. 1 C. P. D. 578-587; Bank of Ireland v. Trustees of Evans' Charities, 5 H. of L. Cas. 389; Colonial Bank of Australia v. Marshall, A. C. (1906) 559; Schoefield v. Earl of Londersborough, A. C. (1896) 514; Macbeth v. North & South Wales Bank, 1 K. B. (1908) 13; Roberts v. Tucker, 16 Q. B. 560; Shipman v. Bank of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Bank v. Nolting, 94 Va. 263, 26 S. E. 826; Welsh v. German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Armstrong v. National Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Harter v. Mechanics' National Bank, 63 N. J. Law, 578-580, 44 Atl. 715, 76 Am. St. Rep. 224; German Savings Bank v. National Bank, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; Janin v. London, etc., National Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

The question arises whether the making of a check payable to a fictitious or nonexisting person, through negligent failure to discover the fraud by which the check is obtained, stands differently from making a check to an actual person, in reference to its effect upon payment by the defendant. We are of opinion that there is no difference in law. In either case it is the duty of the bank to see that there is a genuine indorsement. In some respects it would be more difficult to deceive a bank in this particular, as against vigilant investigation, if the payee was fictitious than if he were real. In some respects it might be less difficult. We know of no decision that has recognized a difference in law between the two cases. It has been held that there is no difference. Armstrong v. National Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655.

The defendant relies upon Bank of England v. Vagliano, A. C. (1891) 107. This case was peculiar in its facts. The Queen's Bench Division (22 Q. B. D. 103) and the Court of Appeals (23 Q. B. D. 243) both decided in favor of the plaintiffs. The law lords, on appeal, were divided in opinion, a majority of them holding that the bills of exchange were payable to a fictitious or nonexisting person, and so payable to bearer under the English stat-

ute. Two of them thought that the decision should be for the plaintiffs. Four were of opinion that the conduct of the plaintiffs precluded them from recovery.

It is to be noticed, first, that the instruments in question were not bank checks, but were in the form of drafts or bills of exchange purporting to be drawn on the plaintiffs by a firm in Greece in favor of a firm in Constantinople. The plaintiffs accepted them, and sent a special letter of advice to the defendant requesting that they be paid at maturity. Some of the law lords were of opinion that the representations of the plaintiffs and the circumstances attending the transaction relieved the defendant of any duty to verify the signature of the payee. Indeed, it was assumed by them that, under the circumstances, the defendant bank was not expected by the plaintiffs to delay the payment until it could send to Constantinople and ascertain whether the signature of the payee was genuine. The decision of the case was made to rest very largely upon the English negotiable instruments act, which makes a negotiable instrument payable to a fictitious or nonexisting person payable to bearer, even though the maker is ignorant of the fact that the payee is fictitious, while, under our statute, as at the common law, an instrument so made is not payable to bearer unless the maker knows that the person named as payee is fictitious or nonexisting. Rev. Laws, c. 73, Sec. 26. This case does not require us to change the rule of law applicable to the payment of checks of a depositor by a banker.

We are of opinion that in the facts stated by the auditor there was no evidence of negligence that relieved the defendant of its duty to pay only to a person authorized to receive the money, under the language of the check.

The case of Shipmen v. Bank of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, is almost identical in its leading features with the case before us, and the decision of it fully covers the conclusion which we have reached. New trial ordered.

NOTE—*Distinction Between Impostor, as Payee and a Non-Existent or Fictitious Person as Such.*—As between depositor and bank the principal case appears to be very generally supported in America, but as between drawer and a bonafide holder it has been held otherwise. See Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336. In England there is a later case than the Vogliana case, *supra*, it was held that a check payable to the order of a person who did not exist, although the drawer supposed him to exist, was within the English statute providing that where the payee is fictitious or non-existent the bill may be "treated as a bill payable to bearer." Clutton v. Attenborough A. C. 90 (1807), 66 L. J. Q. B. N. S. 125. It was said in the opinion in the Armstrong case, supra, that the application of the doctrine that payment to a fictitious person is payment to bearer is confined to cases where the drawer knows the person is fctitious, several older English cases being cited, which appear to have been followed by the Clutton case in construing the English statute. It is also said that the statement in Daniel on Negotiable Instruments, § 139, that the rule is general is not supported by the cases cited thereto.

But it has been held that where one assumes a name, personating another, and procures a check payable to the order of the one whose name is assumed, that this is not the case of a fictitious payee. Thus, it was held, in Land Title T. Co. v. Bank, 196 Pa. 230, 46 Atl. 420, 79 Am. St. Rep. 717, 50 L. R. A. 75. The court said the rule laid down in the principal case should not apply "When the check is issued to one whom the drawer intends to designate as the payee. First, because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely-increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used. There is thrown upon the bank the antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge nor means of knowledge. Secondly, Because in such a case the intention with which the drawer issued the check has been carried out. The person has been paid to whom he intended payment should be made. There has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error, into which he was led by the deception previously practiced upon him." There were two of the five judges dissenting, but the dissents cite no authority, and the majority opinion was later approved in 211 Pa. 211, 60 Atl. 723, 107 Am. St. Rep. 565.

These cases quote from a Kansas case (Emporia Nat. Bank v. Shotwell, 35 Kan. 360) as follows: "The vital point in this case is that Shotwell intended the draft to be sent to the party executing the mortgage and intended it to be paid to the person to whom he sent it, and whom he designated by the name of Daniel Guernsey, because that was the name he assumed in executing the notes and mortgages, and therefore the national bank is protected in paying the draft to the very person whom Shotwell intended to designate by the name of Daniel Guernasey."

There is a case in Massachusetts (Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619), showing a check payable to the order of an impostor, and in the opinion it was said: "It is clear from the facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was intended by them as the payee of the check, designated by the name he was called in the transaction and that his indorsement was the indorsement of the payee of the check by that name.

To same effect see United States v. N. E. Bank, 45 Fed. 163; Levy v. Bank, 24 La. Ann. 220, 13

Am. Rep. 124; Srippen v. Bank, 51 Mo. App. 508. And much authority seems attainable that this rule applies where the question, under like circumstances, arises as between drawer and bona fide holder. See Heavey v. Com. Nat. Bank, 27 Utah, 222, 75 Pac. 727, 101 Am. St. Rep. 966. Possibly this last principle is not much disputed.

While it is held that as we have seen, that an impostor, obtaining a check in the name of one he falsely represents himself to be, is not in effect a fictitious person believed by the drawer to be a real person, yet as he is the one intended by the drawer to get the money called for, the bank is excused by the drawer's antecedent fault or mistake, it is also held that if the imposition consists in representing himself as the agent of a third person, to whom a check is made payable, this third person is fictitious so as to make a bank responsible for payment upon a forged indorsement. Atlanta Nat. Bank v. Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; First Nat. Bank v. Pease, 168 Ill. 43, 48 N. E. 160; Bank v. Bank, 101 Iowa 530, 70 N. W. 769. The distinction here lies as is readily perceived, in the fact that the bank does not pay to the person the drawer intends shall be paid, and there is nothing derogating from the fact that a real person is intended, rather than a fictitious one.

The Shipman case cited by the principal case is construed in a later New York case as recognizing the rule, that if the drawer does not intend a real person, then the fictitious name inserted is equivalent to bearer, and this later case holds that the fraudulent use of a real name by the drawer may make such real name fictitious as meaning bearer. Thus, in Phillips v. Nat. Bank, 140 N. Y. 556, 35 N. E. 892, 23 L. R. A. 584, the facts show that the cashier of one bank drew a check in its name on another bank in the name of one of the customers of the former. The court said: "The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting same. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the powers confided to him for exercise, was enabled to perpetuate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have been prevented." But the Shipman case and the principal case, both, show that the drawers were deceived in consequence of trust confided, and it is possible to suppose that greater vigilance might have earlier discovered and prevented.

It is easy to see why the agency cases we have instanced could suppose no fault excusing a bank, and that impostor payees could excuse the bank on the theory of intention in the drawer, but the cashier in the Phillips case does not seem to have abused his trust any more than employees did in the principal case, or that he was more entrusted in his line than they in theirs.

N. C. COLLIER.

JETSAM AND FLOTSAM.

GOVERNING CITIES BY COMMISSIONS.

BY DON E. MOWRY.

You are interested in bettering your city. I am interested in bettering mine. What are we going to do? Clean out the old party lines and create new ones without changing the system? It will never do. The result will simply be purification of the dilettante and sporadic type.

One by one the cities are adopting the centralized form of government known as the commission plan. Notice this: In places where the commission idea has taken hold there is no return to the old, complicated power-distributed plan where freedom has full swing in the management of the city's affairs.

What is the idea? Simply this: City administration is carried on by commissioners, usually five in number, who direct, control, and are responsible for every department, and even the department executives. Party politics is removed from city elections; complexities of administration are reduced; the ward system is abolished; the finances are placed upon a business basis and responsibility is definitely fixed in case of mismanagement.

Galveston was the first city to try the new experiment, in 1902. Its success is now undisputed. All officers are now elective. The five commissioners appoint the subordinate officers, and are themselves elected by the people at large. The president of the commission is elected separately and is called the mayor. Different departments are assigned to the commissioners; that is, streets and public improvements, fire and police, etc. This body or board determines the budget, and each commissioner has a voice in the final estimate for his department. There is no one-man power, you notice, and all accounts are gone over in a business-like manner. For all of his responsibility the mayor of Galveston receives $2,000 a year, and the other commissioners $1,200 each. Think of it! And Galveston does not contemplate returning to the old cumbersome way of handling city business.

Houston has followed the general features of the Galveston plan. All elections are from the city at large, and elective officers must be owners of real estate and have had a residence of five years in the city. No financial measure is ever considered as an emergency measure, and so cannot be passed on the day it is introduced. Provision for the referendum is made on petition of 500 voters or more, upon all matters of franchises and propositions for municipal purchase. Members of the council cannot hold other offices or be interested in any public work.

Two years ago Iowa passed a law allowing cities to organize under the commission form. Des Moines, being the first city in the state to organize under this law, is often spoken of as the Iowa model and the plan is called the "Des Moines plan." This is the best plan, I believe, for many reasons. A uniform system is provided for cities of a given population. Penalties are imposed for bribery during elections and for violations of the election laws. A majority vote is necessary to pass a measure. A sliding scale is provided for the salaries of the mayor and councilmen, according to the size of the city. All franchises to public service corporations must be submitted to the vote of the people for approval. Civil service, uniform city accounts, the recall, the initiative and the refer-

endum are all given a place, and provision is made for municipal ownership of all public utilities. The Des Moines plan is the most advanced form of commission government yet put into operation. The people have an absolute check upon the administration. They can assert their rights at any juncture. They control their representatives. Responsibility is fixed.

Boise and Lewiston have such charters in Idaho. In Lewiston franchises are limited to twenty-five years, after which time the city may acquire the property. In Boise, no special elections are held. The South Dakota law follows the Galveston plan. The Kansas law is applicable to cities of the first class. Cities in the states of Massachusetts, Maine, Tennessee, Virginia and Oregon have fallen in line. The commission idea is here to stay, and simply because it is meeting with unmistakable success.

The idea has awakened more civic spirit in Cedar Rapids than was ever before known there. This new idea is making a new Cedar Rapids. Men and women consult the members on a hundred things, seemingly trivial as a single proposition, yet important in the civil development as a whole. These matters, great and small, receive prompt attention—so prompt, indeed, that men of years of experience under the old plan are really dazed by the suddenness of action at times.

The commission appointed to investigate the departments of Lynn, Mass., has very recently made its report. The commission states that it is of the opinion that it is impossible to get the best results under the present form of city government. It recommends that action be taken to obtain a new charter and a new form of government based on the Des Moines or aHverhill, Mass., plan, consisting of a board of five members elected by the people.

Governor Stubbs of Kansas announced recently that he would urge the next Legislature to amend the enabling law for cities of the first and second class so that they can, if they choose, adopt either the Des Moines or the Galveston plan of commission rule. At the present time cities of California are endeavoring to have new charters adopted by the people and ready for ratification by the legislature. The popular clamor seems to be for a centralization of power in order to govern more economically.

Here is the value of the commission plan of government. It shows us that the movement for reform extends across the continent, marks the general dissatisfaction with the results of the existing system of municipal administration and opens the way for simplified, economical administration.

More expensive? No, by no means. In Cedar Rapids, after one year's experience, it is seen the salary list is much larger than under the old plan, this being still further increased by the fact that more clerks are employed than formerly. In return for this, however, the city's business is kept written up, and is checked up and indexed like the business of a bank, and is always ready for inspection. The commission started in with the plan of paying cash for everything purchased and adhered to it. More paving, curbing, and sidewalks have been built this past year than ever before; the streets and parks are said to have been kept in better condition; the municipal water plant has been improved and extended and a new fire station is being erected. Notwithstanding the increased amount of improvements being carried on, it is stated that the end of the year will find a surplus in the city treasury.

The one great need for permanent and genuine municipal reform is a quickened civic spirit among business men and more substantial citizens. But it may also be admitted that so complicated a machinery of municipal government as has existed, with its divisions of power among numerous departments and petty places of divided or doubtful responsibility, has played a part in repelling the active interest of business men and turning the city government over to ward leaders and their professional following.—Lofallette's Weekly Magazine.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In reading the number 68 of your Central Law Journal, I found on page 302, under the title, "Notes of Important Decisions," a prohibition case in which you take view that the prohibition law does not release a lessee from liability of rent.

I thought that a law cannot impair the existing contracts and obligations; that the contracts in contravention of the law cannot be enforced; and that the written contracts have to be strictly construed.

Yours very truly, GEO. SLADOVICH.

New Orleans, La.

Our correspondent's questions arise naturally in the mind of any lawyer. But there are considerations which answer each of the questions propounded. 1. A prohibition law does not impair the obligation in the contract of a lease of premises for saloon purposes. His contract is the possession of certain premises for a fixed time. The fact that the law denies the lessee a certain use of the premises does not affect the obligation in the lease. He still has the premises and may use them for any other purpose he pleases. 2. For the same reason, as just stated, the lease is not a contract in contravention of law. If the lease were a partnership agreement between the lessor and lessee to enter into the business of selling liquor and a prohibition law were afterwards passed, then, undoubtedly, the contract would be one to do an act made illegal and would be unenforceable. Such contracts, by the way, are the only kind whose obligation is offset by a prohibition law, and the question has been seriously raised whether the obligation of such a contract is not impaired by such a law. But the law is well settled by Supreme Court decision that the retail liquor business is inherently wrong, exists merely by privilege or license and is not entitled to the protection of the constitutional provision referred to. But on the question of illegality, it is very clear that the lease of premises to one who uses it for a purpose afterwards made illegal by statute, does not become tainted with such illegality and therefore can be enforced despite the fact that a particular use of the premises has been declared illegal. 3. We know of no rules of strict construction of the terms of a written contract that affects the questions involved in the case under consideration. On the contrary, except for the rule that terms used in a written contract are to be strictly construed as to the one who writes the contract and employs the particular terms, a contract is to be liberally construed to effect the intention of the parties.—Editor.

UNSATISFACTORY COURSE OF JUDICIAL DECISION.

Editor Central Law Journal:

In your editorial found on pages 243 and 244 of the current volume, under the title, "The Unsatisfactory Course of Judicial Decision," you discuss a very real evil to the legal profession and the public.

If, by the making of "many books" out of the case law that is given to the public, there was a substantial contribution to the law of the land, it would not be so serious a matter. Not only is this not so, but much of the case law published is confusing, bewildering, and unsatisfactory. It is not helpful to the profession. Often it is misleading. Instances have been known where correct elementary propositions of law have not been stated. The bench has been known to be not learned in the law. The members of same courts have never been experienced practitioners. Their opinions would never command recognition independent of their judicial positions. Naturally, therefore, such decisions do not represent the final word on the subject treated.

Why, then, magnify their mistakes by publishing them in book form and give them a significance not belonging to them? It is harmful to the due administration of justice, because expensive and not justice.

And is not the policy, on the whole, of following precedents as thus enunciated and published, a bad one? Does it accomplish much in the interest of substantial justice? To my mind a safer and better course is found in the application of well-established principles of law to any given statement of facts.

If case law must be published at all let it be done by a competent commission of three or five trained experts, who are capable by education and experience to weed out the chaff from the wheat. Then we may have, indeed, the reports of the courts of last resort, in both state and nation, worthy the name, reports that will aid in the proper construction and application of the law to the case in hand. Such reports would be alike helpful to the courts and to the legal profession. They would point the way to legal justice.

DUANE MOWRY.

Milwaukee, Wis.

BOOK REVIEWS.

WILCOX'S JOYS OF EARTH.

The above is the title of a neat little volume of verse written by Henry S. Wilcox of Chicago, who will be remembered as the author of Foibles of the Bench and other books.

This is his first attempt in the poetical field and all will agree that he has made a good start. The poem from which the book derives its title is a charming presentation of the pleasures that abound on this planet and it cannot fail to delight the reader, even if he cares nothing for poetry in general. Its principal theme is the thought that much of the bliss we expect in heaven abides on earth and that earth life is a pleasant journey upward to a spiritual existence. The ideas are exalting and the rhythm is musical and each part sufficiently varied from the others as not to become monotonous.

The few poems purporting to give personal experience of the author will touch the hearts of most readers. Of these "Retrospection" is as dignified and stately as a classic, and "Fond Memories" is a clear, simple, sweet and tender as a lullaby and yet both give pictures of country life of great beauty and express true affection in choice language.

The book contains a half-tone picture of "Bessie and the Baby." These are the author's daughter and her baby boy. This picture is a delight and the poem of that title is almost as bewitching as the picture. The volume concludes with a piece entitled the "Mardi Gras King," which gives a lucid description of the landing of King Priscus at Pensacola, his parade and the crowning of his Queen.

It begins in this easy fashion:

"On Pensacola's beauteous bay
The Southern breezes softly play;
On Santa Rosa's sandy isle
The midday sunbeams sweetly smile.
In February's placid sky,
A myriad flags and streamers fly,
Their yellow, green and purple hue
Contrasted with its deepest blue.
* * * * * * * *

And thus the poem proceeds and finally concludes with this sentiment:

"Fair Pensacola, while thy bay
Reflects the changing hues of day,
And in the clearness of the night
Gives back to heaven its gracious light,
May all the tides the ocean pours
Come gently to thy peaceful shores,
And ships and nations always find
Thy sheltered bay a harbor kind.
As year by year thy buildings rise
And touch with spires the southern skies
May love and wisdom find a place
In thee to dwell with every race,
And when a monarch rules in thee
May he be 'King of Revelry,'
By fancy framed, unknown in law,
A Monarch of the Mardi Gras."

Printed in one volume of 134 pages and published by Wilcox Book Concern, Chicago.

HUMOR OF THE LAW.

After facing a jury for a couple of hours the judge was congratulating himself that the case was about over, when he accidentally discovered there were only eleven jurors present.

"How's this?" he queried in surprise. "Where's the twelfth man?"

"He went to a funeral, your honor," answered the foreman, innocently; "but he left his verdict with me."

A New England lawyer tells of a judge in a criminal court down East as well known in the vicinity for his good heart as for his legal attainments, says the Philadelphia Ledger. His honor's softness of heart, however, did not prevent him from doing his duty as a judge.

On one occasion a man who had been convicted of stealing a quantity of wearing apparel, was brought into court for sentence. He seemed very sad and hopeless, and it was observed that the court was not entirely unsympathetic.

"Have you ever been sentenced to imprisonment?" asked the judge.

"Never!" exclaimed the prisoner, bursting into tears.

"Don't cry, my man," said his honor, consolingly, "you're going to be now."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Abatement and Revival**—Parties Entitled to Relief.—Neither by statutory suggestion of the death of a party nor by bill of revivor can parties be brought into the suit who do not claim by operation of law as a consequence of the death of the original party.—Haines v. Perkins, Mich., 119 N. W. 439.

2. **Absentees**—Property.—St. 1908, p. 606, c. 590, secs. 56, 57, providing for the payment of savings bank deposits belonging to persons absent for more than 30 years to the State Treasurer, held constitutional.—Malone v. Provident Inst. for Savings in Boston, Mass., 86 N. E. 912.

3. **Accident Insurance**—Notice of Injury.—A liability insurance policy held to require insured to give to insurer immediate notice, in writing, of an accident which may be the foundation of a claim.—Aronson v. Frankfurt Accident & Plate Glass Ins. Co., Cal., 99 Pac. 537.

4. **Adoption**—Inheritance.—An adopted child has no right of inheritance from its adoptive parents other than those given by the law under which adopted.—Boaz v. Swinney, Kan., 99 Pac. 621.

5. **Adverse Possession**—Government Land.—Possession of government land not subject to entry by the entryman and his wife prior to the determination of a contest in the land department held not adverse.—Delacey v. Commercial Trust Co., Wash., 99 Pac. 574.

6. **Animals**—Trespass.—In action for injuries caused by trespassing bull, where plaintiff was not the owner of the real property, he cannot recover as for a trespass.—Peterson v. Conlan, N. D., 119 N. W. 367.

7. **Appeal and Error**—Judgment.—Where there is no error in the judgment except that it includes items for attorney's fees and a collection charge to which plaintiff is not entitled, the order will be an affirmance on remission of such items.—Nesbitt v. Nesbitt, Ind., 86 N. E. 867.

8.——Review.—Whether a default be set aside and the defaulting party allowed to plead to the merits is within the sound discretion of the trial court which, in the absence of abuse, will not be reviewed on appeal.—Aaron v. Holmes, Utah, 99 Pac. 450.

9. **Arbitration and Award**—Oral Submission.—Though at common law generally a submission to arbitration could be made by parol, an exception to the rule prevailed when the title to land was involved.—Walden v. McKinnon, Ala., 47 So. 874.

10. **Associations**—Dissolution.—Certain by-law of unincorporated society held not to authorize by a majority vote the transfer of the members of the society to another society, to the extinguishment of the former society.—Hill v. Rauhan Arre, Mass., 86 N. E. 924.

11. **Attorney and Client**—Suspension and Disbarment.—Attorney's conduct, in the absence of any attempt to make use of a false affidavit, held not to warrant a disbarment or suspension.—In re Watson, Neb., 119 N. W. 451.

12.——Value of Services.—In an action by a firm for attorneys' services, it was not error to refuse to require one of the members to state the reasonable value of his personal or individual services.—Thorp v. Ramsey, Wash., 99 Pac. 584.

13. **Banks and Banking**—Liquidation.—In an action by a bank in process of liquidation, on securities which it has pledged and reassigned to it for collection, allegations of intermediate assignments, or that the bank was in liquidation, were unnecessary.—Merced Bank v. Price, Cal., 98 Pac. 383.

14.——Payment of Check by Bank.—Where a bank pays a check, payable to the payee named, to a person who indorsed the payee's name thereon, without authority, the bank is liable to the payee.—Ellery v. People's Bank, 114 N. Y. Supp. 108.

15. **Benefit Societies**—Beneficiaries.—The beneficiary designated in the certificate of a mutual benefit association held not rendered ineligible by the member securing a divorce from her.—Farra v. Braman, Ind., 86 N. E. 843.

16.——Membership.—Deputy of fraternal association held without authority to depart from the provisions of by-laws, and that an applicant for membership did not become a member.—Loudon v. Modern Brotherhood of America, Minn., 119 N. W. 425.

17. **Bankruptcy**—Discharge.—Under Bankr. Act. 541, sec. 14a, a bankrupt must apply for his discharge within a year and a day from the date of adjudication, unless the time is extended as therein provided.—In re Holmes, U. S. D. C., D. Ver., 163 Fed. 225.

18.——Federal Courts.—A court of bankruptcy is without power to stay an action in a state court against its receiver, to charge him with personal liability, although based on acts done or contracts made by him as receiver.—In re Kalb & Berger Mfg. Co., U. S. C. C. of App., Second Circuit, 165 Fed. 895.

19.——Jurisdiction.—Where a corporation claimed property to which a bankrupt's trustee asserted title, it was the referee's duty to hear testimony in order to determine whether the corporation's claim was real or merely colorable.—In re Holbrook Shoe & Leather Co., U. S. D. C., D. Mont., 165 Fed. 973.

20.——Jurisdiction of Court.—In determining whether a corporation has had its principal

place of business in another state, so as to give the court in that district jurisdiction to adjudicate it a bankrupt, it is immaterial whether or not it complied with the laws of that state to entitle it to do business therein as a foreign corporation.—In re Perry Aldrich Co., U. S. D. C., D. Mass., 165 Fed. 249.

21.——Sale of Bankrupt Estate.—An order of a bankrupt court, directing a sale of the bankrupt's property without mentioning liens, only authorizes a sale subject to existing liens, including a valid judgment lien.—Ex parte City of Anderson, S. C., 63 S. E. 354.

22.——Orders of Court.—A decision of a court of bankruptcy allowing or rejecting a claim of $500 or over is reviewable by the Circuit Court of Appeals only on an appeal taken within 10 days, as provided by Bankr. Act, July 1, 1898, c. 541, Sec. 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).—Postlethwaite v. Hicks, U. S. C. C. of App., Fourth Circuit, 165 Fed. 897.

23.——Proceedings in State Court.—A district court as a court of bankruptcy has exclusive power to determine whether a suit pending in a state court should be stayed or not, and the exercise of this power rests in the discretion of the judge, which will not be reviewed by an appellate court unless it appears to have been abused.—New River Coal Land Co. v. Ruffner Bros., U. S. C. C. of App., Fourth Circuit, 165 Fed. 881.

24.——Property Passing to Trustee.—Merchandise imported for sale by a bankrupt, but bills of lading for which were held by petitioners, who furnished the money to purchase the same, until such bills and the property were turned over to the bankrupt under trust receipts, to be held on storage for petitioners until paid for, held not to have passed the bankrupt's trustee, but to remain the property of petitioners.—In re E. Reboulin Fils & Co., U. S. D. C., 165 Fed. 245.

25.——Receivers.—Consent of an alleged bankrupt to the appointment of a receiver does not authorize such appointment, where it is not absolutely necessary for the preservation of the estate.—T. S. Faulk & Co. v. Steiner, Lobman & Frank, U. S. C. C. of App., Fifth Circuit, 165 Fed. 861.

26.——Voidable Preferences.—In a suit by the trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference, to authorize a recovery, it must be shown that the firm and the partners also were insolvent when the payments were made.—Tumlin v. Bryan, U. S. C. C. of App., 165 Fed. 166.

27. **Boundaries**—Estoppel.—Where a change of a dividing line pointed out by the vendor will result in great injury to the vendee, the vendor and those claiming under him are estopped from insisting that the division line is elsewhere.—Seberg v. Iowa Trust & Savings Bank, Iowa, 119 N. W. 378.

28. **Carriers**—Bill of Lading.—Mere possession of a bill of lading is evidence of title in the holder, either general or special, to the goods embraced therein, and that the bill is not made nor indorsed to such holder is not material.—In re E. Reboulin Fils & Co., U. S. D. C., D. N. J., 165 Fed. 245.

29.——Delay in Delivery of Freight.—The freezing of oranges on trees held not such a proximate result of a failure by a carrier to deliver orange boxes as to render it liable.—Williams v. Atlantic Coast Line R. Co., Fla., 48 S. E. 209.

30.——Duty to Look and Listen.—Failure to look and listen at any point where the approach of a train could have been seen or heard held not necessarily to preclude a recovery, but it is for the jury whether such failure was negligence.—Cleveland, C., C. & St. L. Ry. Co. v. Cyr, Ind., 86 N. E. 868.

31.——Warehouseman.—A common carrier held liable only as a warehouseman after the arrival of the goods at destination, and after the consignee has had a reasonable time in which to remove them.—Norfolk & W. Ry. Co. v. Stuart's Draft Milling Co., Va., 63 S. E. 415.

32.——Written and Printed Provisions of Contract.—In a contract made on a printed form furnished by one of the parties, a provision inserted in writing that time should be of the essence of the contract held to control a printed provision that such party should not be liable for damages on account of delays.—Pike's Peak Hydro-Electric Co. v. Power & Mining Machinery Co., U. S. C. C. of App., Eighth Circuit, 165 Fed. 184.

33. **Charities**—Liability for Injury to Inmate.—A home for working girls, constituting a public charity, would not be liable for an injury to an inmate from the falling of a fire escape on the premises, if the injury was caused solely by the negligence of the institution's servants or agents properly selected by it.—Thornton v. Franklin Square House, Mass., 86 N. E. 909.

34. **Commerce**—Sale of Cigarette Paper.—A sale of tobacco, with a coupon entitling a person to cigarette paper upon sending it to the manufacturer in another state, held not to involve any question of interstate commerce.—State v. Sbragia, Wis., 119 N. W. 290.

35. **Constitutional Law**—Certificate of Canvassing Board.—The certificate of the state canvassing board that a proposed constitutional amendment has been carried held conclusive on collateral attack, and on direct attack can be overthrown only by very clear evidence.—In re McConaughy, Minn., 119 N. W. 408.

36.——Delegation of Legislative Powers.—St. 1905, p. 483, c. 473, creating a board of registration in embalming, if construed to authorize the board to adopt a regulation, held invalid as delegating general legislative power.—Wyeth v. Thomas, Mass., 86 N. E. 925.

37.——Obligation of Contract.—A constitutional amendment authorizing a recovery for property damaged by public use held not objectionable as depriving a railroad company whose line had been previously established of its property without due process of law.—Alabama & V. Ry. Co. v. King, Miss., 47 So. 857.

38. **Contempt**—Grounds.—Where a judgment was within the issues, and the court had jurisdiction of the parties and subject-matter, so that it was not void, that it was erroneous would not prevent one violating it from being guilty of contempt.—Smith v. Schlink, Colo., 99 Pac. 566.

39. **Contracts**—Extra Work.—Stipulation in a contract, that no claim for extra work should be allowed unless done by the engineer's order, could be waived by the subsequent course of dealing.—Charlotte Harbor & N. Ry. Co. v. Burwell, Fla., 48 S. E. 213.

40. **Corporations**—Majority Stockholders.—In an action against a corporation and majority stockholders by a minority stockholder, the court held required to appoint a receiver to settle the affairs of the corporation, unless the majority stockholders will offer a reasonable

adjustment.—Hampton v. Buchanan, Wash., 98 Pac. 374.

41.——Secret Profits of Agents.—Stockholders of a corporation, acting as its committee to purchase land, and inducing it to purchase without disclosing that they were interested, held liable to it for the profits made by them.—Colonizers' Realty Co. of Brooklyn v. Shatzkin, 114 N. Y. Supp. 71.

42.——Stock Certificates.—Where a corporation issues a stock certificate to a person, it hereby holds out to all who may undertake to deal with it that the person is the owner thereof, and has the capacity to transfer it.—Mundt v. Commercial Nat. Bank of Ogden, Utah, 99 Pac. 454.

43.——Transfer of Stock.—As between the immediate parties, the delivery of a stock certificate alone held to pass the equitable title to the stock, though it is essential to the transfer of a complete legal title that it be made upon the corporate books.—Hill v. Kerstetter, Ind., 86 N. E. 858.

44. **Costs**—Affirmance.—The right of respondent to his costs on appeal held not affected by the fact that the court, though affirming the judgment, remanded the cause with directions for the entry of a supplemental order modifying the judgment.—Ami Co. v. Tide Water Lumber Co., Wash., 98 Pac. 380.

45. **Courts** — Establishment. — The district courts of Oklahoma Territory have power to hold adjourned sessions after the commencement of the regular term at a time not designated in the order of the supreme court fixing the terms of said court.—Bidwell v. Love, Okla., 98 Pac. 425.

46. **Covenants**—Easements.—A covenant creating an easement, though not running with the land, held enforceable in equity against a purchaser with notice.—Bryan v. Grosse, Cal., 99 Pac. 499.

47. **Criminal Evidence** — Credibility.—The credibility of witnesses by whom it is claimed newly discovered evidence will be delivered, and whether such evidence would likely produce a different result, are material questions, and it is not error to receive affidavits thereto.—Harper v. State, Ga., 63 S. E. 339.

48.——Hearsay Evidence.—Admission of testimony by a witness at a former trial is not in violation of the rule as to hearsay evidence.—Putnal v. State, Fla., 47 So. 864.

49. **Criminal Law**—Construction of Statutes. —A law which takes away one's property or liberty as a penalty for an offense must so clearly define the acts on which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom.—Brown v. State, Wis., 119 N. W. 338.

50. **Criminal Trial**—Argument of Counsel.—On misconduct of state's attorney in argument to the jury, accused should object, stating grounds thereof, and except to any adverse ruling.—Putnal v. State, Fla., 47 So. 864.

51.——Coercing Jury into Verdict.—The public interest never requires that a jury be coerced into rendering a verdict and a threatened imputation of improper motive by the trial court if the jury do not agree impairs their freedom of action so as to raise a reasonable doubt whether a verdict thereafter rendered was voluntary. —People v. Mayer, 114 N. Y. Supp. 25.

52.——Credibility of Witnesses.—In a criminal case, held fatal error to instruct that the jury should consider the interest of the witnesses and the fact that they had sworn falsely to some material fact.—Gaines v. State, Miss., 48 So. 182.

53.——Misconduct of Court.—Defendant held not entitled to a reversal because of a certain smile by the court during the progress of the trial.—Bellamy v. State, Fla., 47 So. 868.

54.——Motion for New Trial.—An order refusing defendant permission to amend his motion for new trial will not be reviewed where such application is made more than three days after verdict.—Fouse v. State, Neb., 119 N. W. 478.

55. **Divorce**—Alimony.—Debtors of complainant's husband, who had been ordered to pay complainant certain money due her husband to satisfy an award of alimony pendente lite, could not be attached as in contempt on default. —Carper v. Carper, Miss., 48 So. 186.

56.——Alimony.—Imprisonment to compel payment of alimony pendente lite is authorized by Code Civ. Proc. Sec. 1219, when defendant is able to pay.—Ex parte Joutsen, Cal., 98 Pac. 391.

57. **Deeds**—Burden of Proving Undue Influence.—An heir, suing to set aside a deed executed by his ancestor on the ground of fraud and undue influence, has the burden of proving fraud and undue influence.—Schumacher v. Draeger, Wis., 119 N. W. 305.

58. **Descent and Distribution**—Rights of Childless Second Wife.—Under the statute of descents, one-third of a deceased husband's estate descends to his widow in fee, though a childless second or subsequent wife cannot alienate her interest in her husband's property, as against his children.—Rozell v. Cranfill, Ind., 86 N. E. 864.

59. **Eminent Domain**—Establishment of Highway Across Tracks.—Establishment of highway across railroad company's right of way held not to impair its franchise so as to entitle it to compensation for the taking.—New York, C. & St. L. R. Co. v. Rhodes, Ind., 86 N. E. 840.

60.——Railroad Right of Way.—Where land was condemned for an electric railway right of way, the jury could consider on the question of damages every authorized use to which the railroad was entitled to put the land.—Pierce v. Chicago & M. Electric R. Co., Wis., 119 N. W. 297.

61.——Operation of Railroad.—A railroad company, though authorized to operate a railroad line, is liable to an adjoining property owner for damages to his property by the operation of the road so as to create a private nuisance.—Alabama & V. Ry. Co. v. King, Miss., 47 So. 857.

62. **Equity**—Discretion of Court.—Where a bill rightfully invokes the equity jurisdiction of the court, it is not within the discretion of the court to refuse to entertain it because of conditions which came into existence after the bill was filed.—Carnegie Steel Co. v. Colorado Fuel & Iron Co., U. S. C. C. of App., Eighth Circuit, 165 Fed. 195.

63.——Mistake.—Though the terms of an instrument are according to the intent of the parties, if one or both parties are mistaken as to the identity, situation, boundaries, title, amount, value, etc., of the subject-matter, equity will grant appropriate relief, if the mistake is material.—Allen v. Luckett, Miss., 48 So. 186.

64. **Estates**—Determinable Fee.—A determinable fee may embrace what is properly a fee on condition, and, so long as the estate in fee remains, the owner in possession has all the

rights to it which he would have if tenant in fee simple.—Aumiller v. Dash, Wash., 99 Pac. 583.

65. **Evidence**—Declarations.—Declarations of general manager of an express office in the course of a settlement of a claim against the express company held binding on the express company.—Hill v. Adams Express Co., N. J., 71 Atl. 683.

66.——Judicial Notice.—The court will take judicial notice of the general scope and extent of the territory named in a contract binding one to solicit insurance in the states of Oregon and Washington.—Daly v. Old, Utah, 99 Pac. 460.

67.——Market Value.—A witness held competent to testify as to the market value of land taken in proceedings to condemn land for an electric railway's right of way.—Pierce v. Chicago & M. Electric R. Co., Wis., 119 N. W. 297.

68.——Varying Terms of Written Contract.—A prior oral agreement, purporting to change the legal effect of a written contract subsequently to be made, held inadmissible to vary the written agreement.—Commonwealth Trust Co. v. Coveney, Mass., 86 N. E. 895.

69. **Exceptions, Bill of**—Order Setting Aside Default.—A bill of exceptions containing a motion to set aside a default and the evidence should show that the evidence contained was all the evidence given on the hearing.—Milbourn v. Baugher, Ind., 86 N. E. 874.

70. **Executors and Administrators**—Commissions.—An administrator was properly allowed a commission in abortive proceedings to sell land, where all the heirs agreed thereto.—Zimmer v. Saier, Mich., 119 N. W. 433.

71.——Mingling of Trust Property.—An executor, who renews notes and mortgages of the estate, taking the new notes and mortgages in his individual name without authority of court, in effect mingles trust property with his own the same as if he had deposited trust funds to his own credit.—In re Richmond's Estate, Cal., 99 Pac. 554.

72.——Persons Entitled to Letters.—Where the husband of a married woman dying intestate does not apply for letters, or is dead, the letters must be granted to a next of kin not personally disqualified.—In re Degnan, N. J., 71 Atl. 668.

73. **Execution**—Time for Issuance.—The time within which a judgment creditor may enforce his judgment is fixed by statute, and there is no room for the application of the doctrine of laches as ground for injunction.—Ex parte City of Anderson, S. C., 63 S. E. 354.

74. **Fire Insurance**—Subrogation.—Where an insurer has paid to the assured the total amount of the loss, such insurer is subrogated by operation of law to all of the assured's rights of action against third persons who are responsible for the loss, and the assured cannot maintain an action at law in his own right to enforce such liability.—Southern Ry. Co. v. Blunt & Ward, U. S. C. C. of App., S. D. Ala., 165 Fed. 258.

75. **Food**—Statutory Provisions.—So far as Agricultural Law, Sec. 70e express a purpose to prohibit the sale for food of the carcasses of animals too immature to produce wholesome meat, it is a constitutional exercise of legislative police power.—People v. Dennis, 114 N. Y. Supp. 7.

76. **Forgery**—Intent.—Under a statute defining the offense of uttering forged instruments, knowing them to be forged, it is error to charge that the jury should find defendant had knowledge if he had notice sufficient to put a reasonably prudent man on inquiry.—Wells v. Territory, Okla., 98 Pac. 483.

77. **Fraud**—Complaint.—Complaint in an action to recover money alleged to have been obtained by fraudulent representations held to state a cause of action.—Haarstad v. Gates, Minn., 119 N. W. 390.

78.——Reliance on Representations.—One signing a lease through fraudulent misrepresentations that it provided for a monthly hiring could defend on the ground of such fraud and his reliance thereon, though he could read.—Walker v. Freedman, 114 N. Y. Supp. 51.

79.——What Constitutes.—If a person had an option to buy land, its sale and price during the option were wholly under his control, and his statement that it could not be bought for less than a certain amount was not a false representation.—Saxby v. Southern Land Co., Va., 63 S. E. 423.

80. **Frauds, Statute of**—Promise to Pay Debt of Another.—The promise of the grantee, as part consideration of a conveyance, to pay the grantor's debts, held not a promise to pay the debts of another within the statute of frauds.—Naylor v. Davis, 114 N. Y. Supp. 248.

81. **Fraudulent Conveyancing**—Evidence.—Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered.—Yeiser v. Broadwell, Neb., 119 N. W. 473.

82. **Gaming**—Device or Apparatus for Gambling.—A paper conveying information as to a horse race to be run, though useful to a gambler, is not a "device or apparatus for gambling" denounced by Pen. Code, sec. 344.—People v. Engeman, 114 N. Y. Supp. 174.

83. **Gifts**—Inter Vivos.—In transactions inter vivos, the presumption of undue influence is raised solely because of the dependent confidential relation existing between donor and donee; and the donee, to establish the gift, must show that independent advice was relied on by the donor.—In re Cooper's Will, N. J., 71 Atl. 676.

84. **Guaranty**—Exceptions.—Where a guaranty made at the request of the guarantee, its delivery to and for the latter's use completes the communication and constitutes a contract without further acceptance.—McFarlane v. Wadhams, U. S. C. C., E. D. Wis., 165 Fed. 987.

85. **Habeas Corpus**—Jurisdiction.—An order of a district judge remanding a prisoner on habeas corpus does not preclude an application for habeas corpus to the Criminal Court of Appeals.—Ex parte Johnson, Okl., 98 Pac. 461.

86. **Health**—Burial of Dead.—The legislature has power to exercise complete control of burials of the dead, so far as is necessary for the protection of the public health and the promotion of the public safety; and the legislature, in the exercise of its police power, may adopt regulations prescribed by Rev. Laws, c. 78, secs. 37-44, and chapter 29, secs. 6, 8, 10, 11.—Wyeth v. Thomas, Mass., 86 N. E. 925.

87.——Sale of Cigarette Paper.—A sale of smoking tobacco, containing coupons upon which cigarette paper might be obtained from the manufacturer in another state, held violative of Laws 1905, p. 143, c. 82, sec. 1.—State v. Sbragia, Wis., 119 N. W. 290.

88. **Homicide**—Harmless Error.—Employment of "preconceived" for "premeditated" in definition of the statutory crime of murder in the first degree held not prejudicial error.—State v. Mellillo, N. J., 71 Atl. 671.

89. **Justices of the Peace**—Jurisdiction.—The jurisdiction of a justice's court held not destroyed by a substituted defendant interposing a defense which the justice could not entertain, where the action did not come within Rev. Codes, sec. 6992.—Mettler v. Adamson, Mont., 99 Pac. 441.

90. **Landlord and Tenant**—Covenants to Repair.—A covenant for repairs to be made by the tenant held to require the tenant to pay for

rebuilding the walls and resupporting the roof as ordered by the building department.—Bushwick Realty Co. v. Sanitary Fireproofing & Contracting Co., 114 N. Y. Supp. 13.

91.——Fraudulent Representation.—If tenants rescind a lease because of the landlord's fraudulent representations, they must restore the premises to the landlords.—Ciletti v. Acierno, 114 N. Y. Supp. 4.

92.——Injury to Tenant's Goods.—A landlord, under a lease exempting him from any obligation to repair, held not liable to the tenant for damages to his goods occasioned by the imperfect condition of the leased premises.—Erickson v. Porpp, Minn., 119 N. W. 390.

93.——Restriction of Use.—Under a lease prohibiting use of the premises for any other purpose than the conduct of a plumbing business without permission, the tenant forfeited the lease by subletting part of the premises for an electrical supply business.—Denecke v. Henry F. Miller & Son, Iowa, 119 N. W. 380.

94. **Life Insurance**—Accounting.—A bill by the holder of a matured dividend policy for an accounting held to charge such fraud and wrongful misappropriation as entitled him to an accounting.—Peters v. Equitable Life Assur. Society of the United States, Mass., 86 N. E. 885.

95.——Action Against Agent for Premiums.—As between the manager of a life insurance company and an agent appointed by him to solicit insurance and collect premiums, the manager held to have a special property in the premiums entitling him to maintain an action against the agent upon refusal to pay them over.—Hazelton v. Locke, Me., 71 Atl. 661.

96. **Limitation of Actions**—Creditors Suits.—A cause of action in favor of a judgment creditor to reach land conveyed by a third party to the debtor's children is deemed to have accrued when the creditor discovered that the transaction was in fraud of the debtor's creditors.—Foote v. Harrison, Wis., 119 N. W. 291.

97. **Maritime Liens**—Supplies.—A vessel cannot be subjected to a lien for supplies on evidence that they were ordered by some person who represented himself to be either the captain or the cook, and were charged to the vessel, and which fails to show that they were in fact delivered to the vessel or to any one authorized to receive them for her.—The Curtin, U. S. D. C., E. D. Pa., 165 Fed. 271.

98. **Master and Servant**—Assumption of Risk.—A servant struck in the eye by a chip from a burred prosser pin which he was driving held not to have assumed the risk.—Pelow v. Oil Well Supply Co., N. Y., 86 N. E. 812.

99.——Contract of Employment.—Right of action by a master in case of a conspiracy inducing workmen to quit or preventing them from soliciting employment considered.—Badger Brass Mfg. Co. v. Daly, Wis., 119 N. W. 328.

100.——Contributory Negligence.—A member of a train crew, going between cars to couple the air hose, acting on the belief that the switching was practically completed, held not necessarily guilty of contributory negligence.—Allen v. Wisconsin Cent. Ry. Co., Minn., 119 N. W. 423.

101.——Delegation of Duty.—The duty of a master to furnish safe tools and appliances, and to properly warn and instruct servants of dangers incident to the work, cannot be delegated, except at the master's risk.—Pelow v. Oil Well Supply Co., N. Y., 86 N. E. 812.

102.——Discharge of Servant.—If an employee was not hired for any definite period, she could not recover a full month's wages upon being discharged, but only for the time worked.—Reitzfeld v. Sobel, 114 N. Y. Supp. 27.

103.——Fellow Servants.—Engineer, employed by hod elevator company to operate elevator used to aid construction company in erecting a building, held not a fellow servant of an employee of the construction company.—Henry v. Stanley Hod Elevator Co., 114 N. Y. Supp. 38.

104.——Fellow Servants.—Employer held not liable for death of employee, where the employees were expected to build the temporary staging required, and the negligence in the construction was that of a fellow workman.—Stevens v. Strout, Mass., 86 N. E. 907.

105. **Mechanics' Liens**—Establishment.—A provision of a building contract requiring the contractor, when payment was made, if required, to present to the owner a certificate showing the property free from liens chargeable to him, would not affect the contractor's right to payment or to a mechanics' lien, where no certificate was required by the owner.—Morrison Co. v. Williams, Mass., 86 N. E. 888.

106. **Mines and Minerals**—Contracts.—Under a contract allowing decedent to mine specified minerals, and allowing him to relinquish his rights thereunder upon thirty days' written notice, the landowner could waive such notice.—Payne v. Neuval, Cal., 99 Pac. 476.

107. **Municipal Corporations**—Adoption of Ordinances.—A by-law adopted by the board of street and water commissioners, requiring advertisement between first and second reading of ordinances, could not be suspended so as to render advertisement unnecessary and permit introduction and passage of ordinance at the same time.—Eggers v. City of Newark, N. J., 71 Atl. 665.

108.——Assessment for Improvements.—A formal assessment of the cost of laying a sidewalk by a city on the failure of a property owner to do so held not necessary to a recovery by the city.—City of Bluefield v. McClaugherty, W. Va., 63 S. E. 363.

109.——Claimant's Residence.—Where a provision in an ordinance requiring a notice of a claim for damages against the city to give claimant's residence for the past year was unreasonable and invalid, it was error to exclude the notice of claim in an action against the city because it did not give such information.—Hase v. City of Seattle, Wash., 98 Pac. 370.

110.——Negligence as to Person in Park.—A person seated in a city park in broad daylight on a bench provided by the city for public use had a right to assume that a city employee driving a rubbish wagon would exercise ordinary care to avoid injuring him.—Silverman v. City of New York, 114 N. Y. Supp. 59.

111.——Property Adjoining Highway.—An abutting owner may maintain a structure up to the public way, but, if he thereby artificially collects the snow and rain, it is his duty not to discharge it or allow it to escape upon the public way.—Smith v. Preston, Me., 71 Atl. 653.

112.——Provision in City Ordinance.—A provision in a city ordinance requiring the notice of claim for damages against the city to give claimant's residence for the past year was unreasonable, and not essential to the validity of the notice.—Hase v. City of Seattle, Wash., 98 Pac. 370.

113.——Regulation of Advertising Wagons.—An ordinance regulating the use of advertising wagons held to prohibit general advertising for hire, whether carried on wagons wholly used for advertising, or in connection with the ordinary business in which the wagons are engaged.—Fifth Ave. Coach Co. v. City of New York, N. Y., 86 N. E. 824.

114.——Regulation of Sale of Milk.—The mere declaration of a council that an ordinance is passed for the immediate preservation of the public health held neither conclusive nor sufficient in determining whether such an emergency existed, excepting it from a limitation as to the time of going into effect.—Ex parte Hoffman, Cal., 99 Pac. 517.

115. **Navigable Waters**—Diversion of Water.—One obstructing a navigable channel, and thereby causing the diversion of the water in such a way as to wash away the land of a riparian proprietor, will be required to remove the obstruction, restore the river to its former channel, and thereby cause the damage to cease.—Judson v. Tide Water Lumber Co., Wash., 98 Pac. 377.

116.——Use of Land Under Water.—Where plaintiff was the lessee of land under a navigable arm of the sea, his right to cultivate oysters there was subject to the government's right to dredge in the improvement of navigation.—Lewis Blue Point Oyster Cultivation Co. v. Briggs, 114 N. Y. Supp. 313.

117. **Negligence**—Dangerous Walks.—Observation of loose pieces of mortar and powdered

paster cannot be said, as a matter of law, to render a walk so obviously dangerous as to stamp the act of attempting to pass over it as one that no reasonable person would undertake. —Frost v. McCarthy, Mass., 86 N. E. 918.

118.——Ordinary Care.—In cases grounded on negligence, both parties must exercise the care which men of ordinary intelligence and prudence would exercise under similar circumstances and conditions.—Wilkinson v. Oregon Short Line R. Co., Utah, 99 Pac. 466.

119.——Personal Injuries.—Defendant is liable for any personal injury negligently inflicted, though the injury would have been less disastrous if plaintiff had been in perfect health at the time of the accident.—Miehlke v. Nassau Electric R. Co., 114 N. Y. Supp. 90.

120.——Res Ipsa Loquitur.—The doctrine of res ipsa loquitur applies in the case of an explained accident which in the ordinary experience of mankind would not have happened without fault on the part of defendant.—Beattie v. Boston Elevated Ry. Co., Mass., 86 N. E. 920.

121. **Nuisance**—Sugar Plantation.—Owner of sugar plantation held to commit a positive nuisance by throwing slops from his sugarhouse into a canal, to injury of owners of lower estate.—Barrow v. Gaillardanne, La., 47 So. 891.

122. **Parties**—Nonjoinder.—The nonjoinder of the parties will not prevent a recovery on a case showing that defendant and another made the contract declared on, in the absence of a plea in abatement.—Beasore v. Stevens, Mich., 119 N. W. 431.

123. **Perpetuities**—Fidei Commissum.—Creation by last will of fidei commissum may be proved by presumptions, which must leave no reasonable basis for a different conclusion.—In re Billis' Will, La., 47 So. 884.

124. **Pleading**—Complaint.—Complaint in an action to determine the ownership of national bank stock and to whom dividends declared by a receiver should be paid held based upon title to the stock, and not upon a note, in payment of which it was averred that plaintiff accepted the stock.—Hill v. Kerstetter, Ind., 86 N. E. 858.

125. **Principal and Agent**—Ratification.—The failure of owners of railroad bonds to object to an unauthorized sale of the same by a committee for several months after receiving notice of such sale held a ratification of the sale by acquiescence.—E. B. Smith & Co. v. Collins, U. S. C. C. of App., 165 Fed. 148.

126.——Undisclosed Principal.—Where defendant purchased glue from C., without knowing that he was acting for plaintiffs, defendant was not liable for conversion or for the contract price to plaintiffs, who could only recover so much of the proceeds as exceeded C.'s liability to defendant.—Deane v. American Glue Co., Mass., 86 N. E. 890.

127. **Process**—Service.—In case of a married man, "house of his usual abode," is prima facie the house wherein his wife and family reside. —Berryhill v. Sepp, Minn., 119 N. W. 404.

128. **Public Lands**—Entry.—Mere settlement on public lands creates only such rights in the entryman as are given by statute or recognized by rule of the land department.—Delacey v. Commercial Trust Co., Wash., 99 Pac. 574.

129. **Railroads**—Fence Laws.—Lessees of lands adjoining railroad right of way held to have such an ownership therein as to be within the benefit of railroad fence laws.—Barbee v. Southern Pac. Co., Cal., 99 Pac. 541.

130. **Replevin**—Constructive Possession.—A principal's constructive possession of goods in the hands of his agent or bailee is sufficient to entitle the owner to maintain replevin against the principal.—Krebs Hop Co. v. Taylor, Or., 98 Pac. 494.

131. **Sheriffs and Constables**—Conversion.—Where a sheriff is sued in conversion for property levied on, he having been indemnified, it is the practice for him to surrender the control of the litigation to the plaintiff in the original action.—Gehlert v. Quinn, Mont., 98 Pac. 369.

132. **Specific Performance**—Contracts Enforceable.—A party is entitled to specific performance of a contract to convey land which has been so far performed that failure to carry it out would be a fraud on his rights.—Tidewater Ry. Co. v. Hurt, Va., 63 S. E. 421.

133.——Persons Entitled to Performance.—In an action by a partnership for specific performance of a covenant to renew a lease, held immaterial that at certain times during the first term other persons held an interest in the partnership.—Fred Gorder & Son v. Pankonin, Neb., 119 N. W. 449.

134. **Street Railroads**—Injuries at Crossing.—The complaint for injuries on a street car crossing should not be dismissed because plaintiff failed to look at the approaching car after leaving the curb, where the motorman had ample opportunity of observing him.—Robkin v. Joline, 114 N. Y. Supp. 98.

135.——Injury to Passengers on Running Board.—Street railway passenger held entitled to rely upon the assumption that, while boarding the car and passing to a seat, the car would not be started until the danger was removed of its running so near to a team as to injure him.—Lockwood v. Boston Elevated Ry. Co., Mass., 86 N. E. 934.

136.——Speed of Cars.—Unless expressly permitted, the speed of a street car should be no greater than is reasonable and consistent with the customary use of the highway with safety.—Newport News & Old Point Ry. & Electric Co. v. Nicolopoolos, Va., 63 S. E. 443.

137. **Taxation**—Back Taxes.—A suit to enjoin a corporation from disposing of the balance of its property until taxes due had been paid, and for a personal decree for the amount of the taxes, is not an attachment in chancery. —Delta & Pine Land Co. v. Adams, Miss., 48 So. 190.

138.——Railroads.—Taxes assessed against funds of a foreign corporation in the hands of a receiver held collectible only from the property of the foreign corporation found in the possession of the receiver pursuant to Burns' Ann. St. 1901, sec. 8587.—Clark v. Vandalia R. Co., Ind., 86 N. E. 851.

139.——Sale for Taxes.—Where the state undertakes to tack taxes anterior to plaintiff's tax title to a subsequent forfeited sale, the objection of the excessive amount should be interposed by answer.—Minnesota Debenture Co. v. Scott, Minn., 119 N. W. 391.

140. **Vendor and Purchaser**—Procurement of Mortgage Extension.—A vendor held not released from a contract to procure an extension of a mortgage, etc., because the purchasers transferred title to a third person.—Sachs v. Wahsman, 114 N. Y. Supp. 171.

141. **Weapons**—Pointing and Aiming.—An indictment and conviction for "pointing and aiming" a pistol at another, in violation of Code 1906, sec. 1045, prohibiting any person to point or aim a gun, etc., held a charge and conviction of but a single offense.—Coleman v. State, Miss., 48 So. 181.

142. **Wills**—Conveyance by Remainderman.—Where the title of remaindermen under a will was subject to being divested by the lifetenant's survivorship, a purchaser from the remaindermen took no greater title than his grantors could convey.—Schwartz v. Rehfuss, 114 N. Y. Supp. 92.

143.——Right to Income.—Where a life tenant was either entitled to receive the rents and profits or occupy the property, the income did not cease until the right of occupancy was exercised, nor was the choice of occupation irrevocable.—Cashman v. Bangs, Mass., 86 N. E. 932.

144. **Witnesses**—Cross-Examination.—A state witness may be cross-examined to elicit his animus toward defendant, and in such a case it is not necessary that a predicate should be laid.—Telfair v. State, Fla., 47 So. 863.

145. **Work and Labor**—Evidence as to Value. —It is essential to a recovery for work and materials, compensation for which is not fixed by contract, that there should be proof of the reasonable value thereof.—Charlotte Harbor & N. Ry. Co. v. Burnwell, Fla., 48 So. 213.